

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr.Appeal No. 381 of 1993
Reserved on : 29.11.2007
Date of Decision : January 8th, 2008

State of H.P Appellant

Versus

Birbal and others Respondents

Coram:

The Hon'ble Mr. Justice Surjit Singh.J. yes

The Hon'ble Mr. Justice Surinder Singh,J.

Whether approved for reporting ?¹ .

**For the appellant : Mr. Som Dutt Vasudeva, Addl.
Advocate General.**

For respondents : Mr. Ramakant Sharma, Advocate.

Per Surinder Singh, J.

Respondents were tried and acquitted of the offences punishable under sections 147, 302 read with Section 149 of the Indian Penal Code. The State felt aggrieved by the impugned judgment of acquittal and filed the instant appeal.

Admitted facts of the case are that:

**a) the complainant and the respondents
were locked in civil and criminal**

¹ *Whether the reporters of Local Papers may be allowed to see the judgment ? yes*

litigation for quite some time past;

- b) on 26.6.1991 Salmu Ram (deceased) had attended the hearing in a case, pending before the S.D.M.Rampur. He was accompanied by his son Chander Sain.
- c) On 26.6.1991 S.D.M. was not present and his Reader told them that they would be receiving the summons for the next date;
- d) While returning to their village on 26.6.1991 Salmu Ram, Chander Sen, Bhagwan Dass (PW2) and Joginder Singh, reached Jeori, at 5.30 p.m. by a Tapri Region bus.
- e) Deceased Salmu Ram and Simru Ram respondent were the real brothers and Parshotam Dass respondent is the son of Simru Ram. All of them belong to the same village.

PROSECUTION CASE:

The prosecution story as emerges from the record is that after attending the hearing of their case on 26.1.89, Salmu Ram his son Chander Sen accompanied by Bhagwan Dass and Joginder Singh boarded Tapri Region bus from Rampur bus-stand and got down from the bus at Jeori around 5.30 p.m. from there they started on foot to their village Molgi through a *Katcha path*, as their

village was not connected by motor-able road. Simultaneously, the respondents had also reached Jeori by Haridwar bus. Salmu Ram (deceased) was ahead of Chander Sen (PW1). Bhagwan Dass and Joginder Singh were walking behind Chander Sen. At about 8.15 p.m. they reached in between *Kuki Dhar* and *Khota Nala*. It was a moon lit night. All of a sudden, some stones were pelted from above. One stone struck on the head of Salmu Ram and the other on his back. One stone hit the toe-finger of left foot of Chander Sen causing a bleeding injury. Salmu Ram on getting injured started running towards his village, whereas, Chander Sen took shelter under the big boulder, while Bhagwan Dass and Joginder Singh ran backward. Chander Sen, Bhagwan Dass and Joginder Singh identified the respondents in the moon lit night while pelting the stones. Salmu Ram was caught at Khota-Nallah, about two furlongs ahead and they gave beatings to him with Danda and stones. The respondents told to beat Salmu Ram more severely so that his son Chander Sen would come for rescue and they would also beat and kill him. Chander Sen had concealed himself and took shelter beneath a big boulder. He had seen the alleged

occurrence but on hearing the cries of his father, he did not go to rescue him, due to fear. Respondents had killed Salmu Ram and threw him down below the path; his one shoe and cap fell on the path. Seeing this Chander Sen ran from that place and came to police post, Jeori, where he reached around 11 a.m. during the same night and informed the ASI Daulat Ram (PW16). He recorded the Rapat, under section 307 IPC and informed S.H.O. Police station Rampur. Thereafter ASI proceeded to the spot at 4.45 a.m. along with Chander Sen, on the way they came across Bhagwan Dass (PW2) and Mangal Dass (PW4) who informed them that Salmu Ram was dead. Police found the dead body of Salmu Ram on the spot in a sitting posture about 5' down the path along with his broken stick and a danda nearby which were blood stained. These articles were taken into possession by the police. The investigation of the case was converted into Section 302 of the Indian Penal Code.

Police prepared the Inquest report (Ex.PN). Dead body of Salmu Ram was photographed. Statements of the witnesses were recorded. When this process was going on about 11 a.m. on

22.6.1991 SHO Lalman (PW15) of Police Station Rampur reached there accompanied by Dy.S.P. Dead body of the deceased was sent for autopsy. Police prepared the site plan (Ex.PO). Chander Sen (PW1) was got medically examined. The police recorded the statements of the witnesses and on receipt of the report of the Chemical Examiner (Ex.PP) completed the investigation and presented a challan in the court for trial of the respondents under sections 147, 302 read with Section 149 of the Indian Penal Code.

Finding a prima-facie case against the respondents, they were charge sheeted under the aforesaid sections, to which they pleaded not guilty and claimed trial.

To prove its case, the prosecution examined Chander Sen son of the deceased as PW-1, Bhagwan Dass (PW2) who was accompanying them, Jawala Dass (PW3) Mangal Dass (PW4), Narain Dass (PW5), Dr.Pardeep Bansal (PW6), Diwan Singh (PW7), Jethu Ram (PW8), Ram Dayal (PW9), Constable Jagdish Singh (PW10), Pawan Kumar (PW11), Krishan Chand (PW12), Dr. Rajeswi Ajay Azad (PW13), Parmod Thakur (PW14) and Inspector SHO Lalman (PW15) and Daulat Ram ASI (PW16).

Respondents were also examined under section 313 of the Code of Criminal Procedure and their case was of denial simpliciter.

On the strength of the aforesaid evidence, the trial court called upon the respondents to enter into their defence.

Respondents examined Hira Singh (DW1), Cheering Ram (DW2) and Sunder Singh (DW-3).

After hearing the learned counsel for the parties and going through the evidence on record, the learned trial court disbelieved the prosecution evidence and acquitted the respondents on the ground that:

- a) During night it was not possible to identify the accused-persons in the moon light;
- b) In case, accused persons had caught hold Salmu Ram at Khota-nala and gave danda and stone blows, threw the dead body below the Dhank, as alleged, in that event respondents should have sustained the blood stains on their clothes, which were not found this makes the story of the prosecution doubtful;
- c) If Simru Ram respondent was with the other accused persons,

it was not possible for him to reach Rampur on the next day i.e. on 27.12.1991 at 10 a.m. to attend the hearing in the court, as last bus from Jeori to Rampur leaves in the morning at 10.a.m. Thus, it rules out the possibility of all the accused persons being present at Khota-nala and having beaten Salmu Ram (deceased) as alleged.

- d) Testimony of Chander Sen (PW1) appeared to be against human conduct as he did not raise any alarm when his father Salmu Ram was being beaten up by the accused-respondents. Chander Sen was an interested witness and he is appeared to have concocted a false story against the respondents before reporting the matter to the police at Police Post Jeori;
- e) Due to the long litigation, inter-se the parties, the false implication of the respondents in the case cannot be ruled out;

Thus, the trial court gave the benefit of doubt, to the respondents and acquitted them.

CONTENTIONS RAISED BEFORE US

In the present appeal, Sh. Som Dutt Vasudeva, learned Additional Advocate General argued that on the basis of the evidence on record the conclusion drawn by the learned trial court is perverse. He further ventilated that the respondents were named as the assailants in the FIR, lodged by the complainant Chander Sen without any delay during the same night. He had reported the matter to the police to the extent he had seen. Even he was not aware of the death of his father. Next morning Bhagwan Dass and Joginder Singh had informed him and the ASI Daulat Ram that Salmu Ram had died. It was possible to identify their own family members and the co-villagers in the moon lit night. The deceased had sustained fatal injury on his head, which according to the Doctor R.A.Azad (PW13), it could be caused by the stone. It was also argued that the respondents due to the litigation had a strong motive to commit murder. The complainant had acted in a prudent manner and he had given cogent explanation for not rescuing his father at the cost of his life. The evidence of the prosecution is direct, duly corroborated by the

surrounding circumstances, worth inspiring confidence; therefore, judgment of acquittal can be converted into conviction.

Contra, Shri Ramakant Sharma, learned counsel for the respondent, while supporting the impugned judgment of acquittal has forcefully argued that the path which leads to the house of the complainant and that of the respondents, from Jeori is different. There was no occasion for the respondents to go ahead of the complainant party up to a distance of 4/5 kms to select a difficult place to throw stones upon them and commit the murder as alleged. It is further argued that the respondents were alleged to have come in another bus, after the bus of the complainant had left, therefore, to reach on the alleged spot of incident, before the complainant was not possible. It was a dark night and the deceased might have fallen down while walking on a hilly terrain and the complainant took the right opportunity to vindicate the grudge by implicating them in this case. It is also argued that the findings of acquittal are borne out from the record, therefore, it requires no interference.

OUR FINDINGS

We have carefully examined the rival contentions of the rival parties and have gone through the evidence on record in its minutest details.

Before jumping to any conclusion, it shall be quite relevant for us to reappraise and re-evaluate the evidence on record, to find out whether the conclusions arrived at by the trial court are possible.

Chander Sen (PW1) and Bhagwan Dass (PW2) are the alleged eye witnesses. Chander Sen (PW1) has stated that after attending the S.D.M.Court he along with his father Salmu Ram (deceased), came to the Bus Stand Rampur where Haridwar-Sarahan Bus was standing. Birbal and Simru respondents were sitting in that bus but due to huge rush they could not board it. Thereafter, they took Tapri region bus to Jeori. Bhagwan Dass and Joginder Singh were also sitting in that bus. It reached Jeori at 5.30 p.m. When they alighted from the bus, accused-respondent Purshotam Dass s/o Simru Ram had threatened his father Salmu Ram that he would not be left alive on that day by him. Thereafter, all of them (PW1) his father

Salmu Ram, Bhagwan Dass and Joginder Singh left for their village on foot, when they reached in between Kuki-Dhar and Khota Nala they noticed the stones were being pelted on them from above. Salmu Ram was ahead of all, he was followed by him (PW1) Bhagwan Dass and Joginder Singh were behind him. One stone had hit the head of his father while the other struck against his back. Another stone hit him on the little finger of the left foot. It was a moon lit night. His father started running fast towards his village while he (PW1) took shelter below a big boulder to save himself from being hit by the stones. He had identified the respondents Birbal, Chand Ram, Simru Ram, Purshotam Dass and Kalu Ram throwing the stones upon them. All the above five persons ran towards his father. He also followed them in order to save his father from their attack, but his father was caught hold by the respondents at Khotanala and they started giving beatings to him by dandas and stones. He also heard the respondent Purshotam Dass saying that his father was to be killed on that day and he should be beaten in a manner that he cried loudly so that Chander Sen come there and they will also give

beatings to him. His father was shouting "Maar Dia Maar Dia Bachao-Bachao" but he (PW1) did not intervene due to fear. The respondents killed his father and threw him down the path. Thereafter, he rushed to Police post, Jeori and reported the matter to the police on the same night. Next morning, he had accompanied the police to the place of occurrence and found his father dead down the katcha path, his blood stained cap Ex.P-3 was lying on the road, which had a cut on the centre, blood stained shoe Ex.P-2 was also lying there. Danda which was found nearby the dead body was also blood stained. The clothes which were worn by his father i.e. Shirt, Pyjama and Coat were also smeared with blood. Police took into possession the blood stained stones from the spot and clothes which were sealed separately.

In his cross-examination he has stated that Haridwar-Sarahan Bus left Rampur at 4 p.m. and the Tapri bus, in which they traveled up to Jeori, had also left the Bus Stand Rampur at the same time whereas, the bus in which they traveled reached ahead of Haridwar-Sarahan Bus at Jeori. The place of occurrence was about 3-4 kms from Jeori. He has admitted that Simru Ram respondent

was also having date of hearing on the next day of the occurrence at Rampur. He has stated that the place from where the stones were being pelted was visible from the road, but was not accessible directly from that place, where they were walking. When he asked as to who was throwing the stones, no one responded but the respondents came down on the katcha-path. He further stated that Birbal respondent was holding a danda in his hand and the other respondents were having stones. When his father was crying for help he was at a distance of fifteen feet from them and all the respondents were beatings and threw him below the dhank, but he could not tell the detail, which of the respondent had given beating on which part of the deceased. He has further stated that there was no village or house in between the police post Jeori or place of occurrence and he did not call any one for help. Bhagwan Dass & Mangal Dass met him on the next morning at about 6 a.m. at Katol Pul. They were going to Jeori. On the night of the alleged occurrence, he had informed the police about the threats given by Purshotam Dass in the presence of Bhagwan Dass, Joginder Singh and Smt.Shukri Devi to his father at Jeori. He

was confronted with his earlier statement Ex.PB wherein it was so recorded. He has also admitted that there are two different paths leading to the village Molgi and Julli. They had reached the place of occurrence at about 8.30 p.m. He was wearing Chappal on the day of occurrence, which was blood stained, due to an injury caused on his foot. Chappal was not taken into possession by the police or the Doctor. He has stated that he was aware of the hearing of the case on 26th and 27th of that month in the court of S.D.M.Rampur. Rest of the suggestions were denied by him. It is also stated by him that only one stone had hit head of his father and other struck his back. He did not know whether the blood had oozed out from the head injury of his father. It is specifically stated by him when stones were being pelted by the respondents upon them, his father went running ahead and he himself (PW1) took shelter below a boulder whereas Bhagwan Dass and Joginder Singh had run back Khota-nala where his father was beaten up was at a distance of 100 yards away from the place they received stones from above and Purshotam had spoken in Hindi that this father

should be beaten so that he should cry and on hearing his cries, he (PW1) should go there, so that respondents could also kill him along with his father. He has stated to have made this statement to the police but it was not so recorded in Ex.PB.

Bhagwan Dass (PW2) has corroborated his version with respect to the occurrence. Further according to him, respondents were identified by them in moon-lit-night. He along with Joginder Singh, ran back up to **Chhichhri Dharti** area. There was no house or village. He has stated that the respondents had followed Salmu Ram and after some time they heard his cries "Bachao Bachao". They went up to a place known Oddi place and gave whistles, which were heard by Jawala Dass (PW). On hearing the whistles, he told that Salmu Ram had run towards his village and respondents had run after him. Jawala Dass called them up to his house. They narrated about the entire incident to him. Thereafter, he along with Jawala Dass and Joginder Singh tried to search for Salmu Ram, when they reached Khota-nallah, they found the cap of Salmu on the path along with his shoe and also found dead body of Salmu Ram just below

the path in a sitting posture, one danda was lying there, thereafter they went to village Molgi, of the deceased, along with Jawala Dass and informed his other family members and came back to guard the dead body of Salmu Ram along with other villagers. In the morning he along with Mangal Dass started for Jeori and on the way they met Chander Sen (PW1) and Police Thanedar, who were going to the place of occurrence. They were informed that Salmu Ram was lying dead. Police reached the spot and took into possession the dead body along with the stone, cap, danda and a shoe.

In his cross-examination he has stated that during that time he was In charge of the Typing Institute at Rampur and was also learning type writing. He had taken leave on 26.6.1991 to visit his village, from the owner of the Institute and left for his house at about 4 p.m.. According to him, Sarahan-Haridwar bus and Tapri Region bus used to leave Rampur at 4.30 p.m. but on 26.6.1991 Tapri Region bus left Rampur earlier to Sarahan-Haridwar Bus. The witness was subjected to a lengthy cross-examination but he

stood well as far as identification of the respondents and pelting of stones is concerned.

During investigation, he was associated by the police. On 29.6.1991 the police took into possession the blood stained pant (Ex.P-9), produced by Birbal. Danda Ex.P-1 which was already taken into possession in his presence from the spot along with Shoe Ex.P-2, cap (Ex.P-3) and stones Ex.P-4 and P-5. He has denied the suggestion in his cross-examination that the pant was not taken into possession from Birbal. Further according to him, the place of alleged occurrence was 9 k.m. from Jeori and the stones were being pelted from a distance of ten meters and the place was not visible to them but he could identify the respondents.

Jawala Dass (PW3) has also corroborated whatever Bhagwan Dass (PW2) has stated. According to him, when he heard the whistles from Oddi side, he got up and called for the persons who were whistling. At that time, Shankar Dass, Mahender Singh and Devi Singh were with him. He found that it was Bhagwan Dass, who was whistling and Joginder Singh was accompanying him. On inquiry they narrated the entire incident to him

and he along with others accompanied Bhagwan Dass, at his request to search for Salmu, ultimately they could find his dead body down the katcha path.

In his cross-examination he has stated that his house is at about 2 kms from the place of occurrence. There was no path from the place of occurrence leading up to the jungle. Further according to him, names of the respondents were disclosed by Bhagwan Dass to him and this fact was also told to the police.

Mangal Dass (PW4) was informed by Bhagwan Dass regarding the death of Salmu Ram having been killed by the respondents. He along with Bhagwan Dass set out for Jeori to lodge a report but on the way he met Chander Sen who was accompanying the police.

PW5 Narain Dass (Vice President of Gram Panchayat Labana) is a witness to the recovery of Danda Ex.P-1, stones Ex.P-4 and P-5, shoe Ex.P-2, cap Ex.P-3. PW7 Diwan Singh (Patwari) had visited the alleged place of occurrence and prepared the Tatima Ex.PE. Jathu Ram (PW8) Ahlmad of S.D.M.Rampur has placed on record certified copy of the orders dated 26.6.1991 Ex.PF and

Ex.PF/1, regarding date of hearing, Kishan Chand Reader of the SDJM Ist Class Rampur Bushahr has produced record of the civil and criminal cases.

Dr. Rajeswi Ajay Azad (PW13) had examined Chander Sen on 27.6.1991 and found a lacerated wound of left little toe, 3 cm x 1 cm deep. There was clotted blood and mud on the wound. The nature of the injury was simple, having been caused within 24 to 48 hours and issued the M.L.C. Ex.PG to this effect.

Dr.Pardeep Bansal (PW6) had conducted the post mortem of the dead body of the deceased and found the following injuries:

1. Depressed area on the occipital in the middle about 1cm x 1 cm in size
2. Lacerated wound 2cm x 1½ cm on left temporal region. Bleeding clots from nose and ears and mouth;
3. whole left upper arm is contused;
4. whole right lower limb is contused;
5. Anterior part of left lower leg is contused;
6. Dorsum of right hand is contused;
7. Extra dual space full of blood clots in the temporal and occipital region;
8. Major artery in the temporal region is ruptured;

9. Artery in the occipital region is also ruptured.

In the opinion of the Doctor, all the injuries were grievous and the deceased had died due to head injury followed by massive intercranial hemorrhage leading to coma and death. The duration in between injuries and death was one to two hours and the duration in between post mortem and death was 36 to 40 hours.

In the cross-examination he has denied having caused these injuries by a fall but stated that these injuries could be caused if the stones were pelted from above the road and the same struck against the deceased, even from a distance of 4-5 feet / 1 to 2 meters. He also stated that despite timely treatment, the injured would have certainly died. The Doctor has further stated that injury on the skull could be caused, if some one had fallen down from a considerable height and also admitted that the injuries could be caused if there has been successive fall.

The respondents examined Hira Singh DW1 to prove that respondent Simru Ram stayed with him at Rampur on 26.6.1991. DW2. Cheesing Ram has stated that Purshotam Dass s/o Simru Ram had met

him around 6 p.m. on 26.6.1991 while going to the house of his in laws. DW3 Surinder Singh brother-in-law of Purshotam Dass has stated that both had stayed together for the night. But none of the witnesses had represented to the police or higher authorities that Simru Ram and Purshotram Dass were wrongly implicated in the case.

CONCLUSION

Thus on the re-appraisal and re-evaluation of the evidence on record, in our considered view, the acquittal of the respondents, arrived at by the trial court was not at all possible, as the identity of the respondents stands clearly established by the prosecution witnesses, who were close relations, living in same village and were having interse long litigation, therefore, it was quite possible for PW1 and to Bhagwan Dass a co-villager to identify the respondents in the moon-lit-night. Even the Investigation Officer has stated that on 27.6.1991 he had noticed the moon-lit-night almost during the same time. The statement of the eye witnesses discussed above leave no room for doubt regarding the identification of the respondents.

Further the pant of Birbal was also found to be blood stained. Thus the possibility of their false implication is totally ruled out. Chander Sen had lodged the report with ASI Daulat Ram (PW11) at Jeori to the extent he had seen the occurrence. The death of Salmu Ram had come to his notice later when PW2 Bhagwan Dass and Mangal Dass had met him. Correctness of his version is further corroborated by the injury on his toe finger, as deposed by the Doctor.

The statement of Chander Sen cannot also be doubted on the ground that he did not come to rescue his father because according to him, he did not intervene due to the fear since his father was being brutally beaten up by the respondents. Thus it cannot be looked up on adversely, as his life was also in peril.

The presence of all the respondents on the spot, as stated by the above eye witnesses stands fully established.

The plea of *alibi* set up by Simru Ram and Purshotam Dass in defence was not set up by them either in cross-examination of the alleged eye witnesses or in the statement under section 313 Cr.P.C. even otherwise they could not

cogently prove and it appears to be an after thought, therefore, it is worth rejecting.

The defence also took up the plea of false implication of the accused-respondents due to enmity because of civil and criminal cases against them. It is well established that the enmity is a double edged sword which can cut for and against. In other words it may be a strong motive to the accused to commit a crime also. Since Chander Sen had seen his father being brutally beaten up and he met with a violent death. How can he forget the real assailants and substitute them for the respondents? It stands clearly established on record that the respondents had nourished enmity against the deceased Salmu Ram because of the long litigation thus they finally decided to do away with his life.

Therefore, for the reasons aforesaid in our considered opinion, the impugned judgment passed by the trial court is perverse, accordingly it is set aside and all the respondents are convicted of rioting, committing the murder of Salmu Ram in prosecution of their common object punishable under section 147, 302,

read with section 149 of the Indian Penal Code.
Consequently the State appeal is accepted.

The respondents shall be heard on
the quantum of sentence. Non-bailable warrants
for their production be issued for 28.2.2008

(Surjit Singh), J.

January 8th, 2008
(D)

(Surinder Singh), J.